IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

SHANE G. S.,

Plaintiff,

v. Civil Action No.
5:20-CV-0193 (DEP)

ANDREW SAUL, Commissioner Social Security Administration,

Defendant.

APPEARANCES: OF COUNSEL:

FOR PLAINTIFF

LEGAL AID SOCIETY OF MID-NEW YORK INC.
221 South Warren Street, Suite 310
Syracuse, NY 13202

ELIZABETH LOMBARDI, ESQ.

FOR DEFENDANT

SOCIAL SECURITY ADMINISTRATION
Office of General Counsel
J.F.K. Federal Building
Room 625
Boston, Massachusetts 02203

NATASHA OELTJEN, ESQ.

DAVID E. PEEBLES
U.S. MAGISTRATE JUDGE

ORDER

Currently pending before the court in this action, in which plaintiff seeks judicial review of an adverse administrative determination by the Commissioner of Social Security ("Commissioner"), pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3), are cross-motions for judgment on the pleadings.[1] Oral argument was conducted in connection with those motions on March 2, 2021, during a telephone conference held on the record. At the close of argument, I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner's determination did not result from the application of proper legal principles and is not supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by the plaintiff in this appeal.

After due deliberation, and based upon the court's oral bench decision, a transcript of which is attached and incorporated herein by reference, it is hereby

ORDERED, as follows:

[1] This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18. Under that General Order once issue has been joined, an action such as this is considered procedurally, as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

1) Plaintiff's motion for judgment on the pleadings is GRANTED.

2) The Commissioner's determination that plaintiff was not disabled at the relevant times, and thus is not entitled to benefits under the Social Security Act, is VACATED.

3) The matter is hereby REMANDED to the Commissioner, without a directed finding of disability, for further proceedings consistent with this determination.

4) The clerk is respectfully directed to enter judgment, based upon this determination, remanding the matter to the Commissioner pursuant to sentence four of 42 U.S.C. § 405(g) and closing this case.

David E. Peebles
U.S. Magistrate Judge

Dated: March 3, 2021
Syracuse, NY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK
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SHANE G. S.,

Plaintiff,

vs. 5:20-CV-193

ANDREW M. SAUL, COMMISSIONER OF SOCIAL SECURITY,

Defendant.
----------x

Transcript of a **Decision** held during a Telephone Conference on March 2, 2021, the HONORABLE DAVID E. PEEBLES, United States Magistrate Judge, Presiding.

A P P E A R A N C E S

(By Telephone)

For Plaintiff: LEGAL AID SOCIETY OF MID-NEW YORK INC.
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(The Court and all counsel present by telephone.)

THE COURT: Thank you. Let me begin by thanking both counsel for excellent presentations, I've enjoyed working with you.

Plaintiff has commenced this proceeding pursuant to 42 United States Code Sections 405(g) and 1383(c)(3) to challenge the finding by the Commissioner of Social Security that plaintiff was not disabled at the relevant times and therefore is ineligible for the benefits which he sought.

The background is as follows: Plaintiff was born in August of 1957, he is currently 63 years old. He was 58 years of age at the time of the onset of his alleged disability in May of 2016. Plaintiff stands between five-foot-five and five-foot-six inches in height and at various times has weighed between 238 pounds and 272 pounds, the latter figure was cited during the hearing testimony of the plaintiff. Plaintiff is single and has no children. He lives alone in an apartment in Syracuse, New York. Plaintiff has a high school diploma and has achieved both a bachelor's degree in music performance and a master's degree in music education from Syracuse University. Plaintiff has a driver's license but no car. He does take public transportation. Plaintiff is right-handed.

The evidence is equivocal as to when plaintiff

stopped working. In the function report that was submitted he indicated that occurred on April 28, 2016 but in his hearing testimony, he stated that it occurred on May 18, 2016.

As an aside, hopefully -- I'm going to ask both of you to mute your phones if you have not done so already.

Plaintiff worked from September 1981 to May of 2010 in various positions as a library technician. He worked from April 2012 to April of 2016 part time as a receptionist in a nonprofit setting. He left there, taking medical leave as a result of his incontinence issues and odors associated with that issue.

Plaintiff suffers physically from fecal and urinary incontinence, bilateral knee issues that have been diagnosed by Dr. Seth Greenky as medial meniscus tears, he has a back condition, he suffers from diabetes, sleep apnea, asthma, and hypertension. He has not undergone any magnetic resonance imaging or MRI testing of his back or knees because he has an implant that precludes MRI testing. An InterStim bowel control device was implanted in the plaintiff in August of 2013, that appears at 407 and 408 as well as 415 of the administrative transcript. He also underwent Botox injections in August 2015 to address his urinary incontinence issue, that appears at page 770 of the administrative transcript.

Plaintiff's lumbar back was x-rayed on November 5, 2018. The resulting impression was, there are six non-rib-bearing vertebrae, mild to moderate degenerative disease is seen, no acute bony changes noted. In the findings, it was indicated that vertebral body height and alignment overall is maintained, some osteophyte formation and facet arthropathy seen at several levels consistent with degenerative disease. No acute fracture is noted. Sacroiliac joints are intact. A stimulator and power pack is noted. That appears at page 1850 of the administrative transcript.

Mentally, plaintiff suffers from a condition that has been variously diagnosed as bipolar disorder, depression, generalized anxiety disorder, affective disorder. It is indicated, but the evidence is equivocal, that he may have autism spectrum disorder, although plaintiff says no at page 907, but there's an indication at page 1103 of the administrative transcript that he does.

Plaintiff's primary care provider is Dr. Laura Martin with Family Medical Care Group. He has also seen Dr. Borys Buniak of Gastroenterology and Hepatology of Central New York, Dr. Shawn Springer, Nurse Practitioner Tammy Balamut, and Clinical Social Worker Adam Schwartz at Circare, Dr. Margaret Plocek of Colon Rectal Associates of Central New York, Dr. Andres Madissoo of AMP Urology,

Dr. Brett Greenky of Syracuse Orthopedic Specialists, mentally Dr. Masud Iqbal of Upstate Psychiatric Care, also seen Dr. Bala Murthy of Nephrology Associates of Syracuse and various other providers including nurse practitioners and registered nurses.

Plaintiff has a fairly wide range of activities of daily living and interests. He's able to dress, bathe, groom, cook, wash dishes, clean, do laundry, shop, take out trash, drive, take public transportation, socialize with friends and family, mall walk, watch television, listen to radio, and attend Alcoholics Anonymous meetings five times per week. Plaintiff does not smoke. He did apparently suffer from alcohol and marijuana abuse from 1975 to 1989.

Procedurally, October 26, 2016, plaintiff applied for Title II and Title XVI benefits, alleging an onset date of May 18, 2016. At page 295, he claimed disability based on incontinence, autism, sleep apnea, generalized anxiety disorder, hypertension, high cholesterol, bladder outlet obstruction, enlarged prostate, and chronic nocturnal enuresis. I note that there were apparently prior applications that were denied, last being on July 25, 2016.

On November 26, 2018, a hearing was held by Administrative Law Judge Charles Woode. On January 29th, 2019, Judge Woode issued an unfavorable decision, finding that plaintiff was not disabled at the relevant times. That

became a final determination of the agency on January 17, 2020 when the Social Security Administration Appeals Council denied plaintiff's application for review. This action was commenced on February 21, 2020, and is timely.

In his decision, ALJ Woode applied the familiar five-step sequential test for determining disability. He first found that plaintiff's last date of insured status was December 31, 2018.

At step one he concluded plaintiff had not engaged in substantial gainful activity since May 18, 2016.

At step two, ALJ Woode concluded that plaintiff suffered from medically determinable impairments, including fecal and urinary incontinence, left sacroiliitis, lumbar degenerative disk disease, knee pain, obesity, generalized anxiety disorder, and autism spectrum disorder. He concluded, however, that none of those impairments were severe in that none of them precluded plaintiff's ability to perform the basic functions of work and therefore ended the analysis.

The court's function of course is to determine whether correct legal principles were applied and the resulting determination is supported by substantial evidence. Substantial evidence is defined as such relevant evidence as a reasonable mind would accept as sufficient to support a conclusion.

In this case plaintiff raises three basic contentions. First, he contends that the failure to find any severe impairments at step two was error, pointing to incontinence, back pain, knee pain, mental condition, and obesity.

Secondly, he contends that the administrative law judge erred in failing to address and give weight or indicate what weight is being given to medical opinions in the record including from Dr. Laura Martin, a treating source, Dr. Margaret Plocek, treating source, and Clinical Social Worker Adam Schwartz, who also treated the plaintiff.

And thirdly, he contends that the administrative law judge improperly rejected his subjective complaints regarding his symptoms without proper explanation, an argument that we used to refer to as credibility under the old regulations and case law.

In response, defendant argues that plaintiff failed to carry his burden of demonstrating a severe impairment at step two limiting his ability to perform basic work functions.

Secondly, it was admitted error not to weigh the medical opinions in the record but the error was harmless and if the administrative law judge had applied the proper standard, they would not have been given controlling weight.

And thirdly, the administrative law judge explained

his reasoning for the evaluation that he gave to plaintiff's complaints.

Turning first to the step two argument, under the governing regulations, an impairment or combination of impairments is not severe if it does not significantly limit a claimant's physical or mental ability to perform basic work activity. 20 C.F.R. Section 404.1521(a). The section goes on to describe what is meant by the phrase basic work activities, defining that term to include both the abilities and aptitudes necessary to do most jobs.

The second step requirement is notoriously de minimus. It is intended only to screen out the truly weakest of cases. *Dixon v. Shalala*, 54 F.3d 1019 at 1030, Second Circuit 1995. However, the mere presence of a disease or impairment or establishing that a person has been diagnosed or treated for a disease or an impairment is not by itself sufficient to satisfy the step two test and establish a condition as severe. *Coleman v. Shalala*, 895 F.Supp. 50 at 53, Southern District of New York 1995.

In this case, if the Commissioner erred at step two, the error is not harmless. Many cases that we see where an administrative law judge has proceeded to step three of the sequential analysis, we may find, or may not, that the error is harmless if the condition was properly considered when the residual functional capacity or RFC was formulated.

In this case, clearly the error is harmless -- harmful if there was an error because it ended the inquiry.

Turning to the back and knee, one thing that the Commissioner argued -- that the plaintiff argued was focused on the durational requirement. It was addressed at page -- the knee and back issue was addressed at page 18 to 19. The Commissioner I think argued and I think cited *Perez v. Astrue* for the proposition that the condition must last 12 months. The actual regulation which is supported as well by the statute which is 42 United States Code Section 423(d)(1)(A) and the regulation is 20 C.F.R. Section 404.1509, requires in terms of duration that it either has lasted or the condition can be expected to last for a continuous period of not less than 12 months. *Gladle v. Colvin*, 2013 WL 5503687, from the Northern District of New York, September 30, 2013. However, I've reviewed carefully the administrative law judge's decision, it does not appear to turn on the durational requirement but instead focuses on the severity prong of the appropriate test. The administrative law judge cites such things as conservative treatment, the limited treatment of plaintiff's knee and back conditions, the fact that Dr. Greenky was only consulted once with regard to the right knee and once or twice or limited number with regard to the left. The problem is that the administrative law judge doesn't indicate whether he considered the opinion of

Dr. Martin which, although it doesn't specify that it relates the limitations presented to the back and knee, strongly suggests that it might have been. And given the de minimus standard at step two, I think it was error not to conclude at step two that the back and knee conditions were severe.

Turning to obesity, the administrative law judge addressed obesity briefly in one paragraph of his decision that appears at page 19 and he finds that it is not severe. He claims that he has considered the obesity as required under Social Security Ruling 02-1p. That ruling gives guidance as to how obesity is to be addressed and how to address the interplay between obesity and its potential impact on disability and on other conditions such as, for example in this case, the back and knee conditions. The paragraph that addresses obesity is very scant. It states that the ruling has been complied with and, "The cumulative effects of the plaintiff's obesity have been fully considered in the same manner as all other medically determinable impairments. The claimant's obesity is medically determinable but since it does not cause or contribute to any significant limitations on the claimant's ability to perform basic work activities, it is not severe." I agree with the plaintiff that I think this explanation is -- does not fully articulate the reasoning and does not comport with the SSR 02-01p, *Marthe v. Colvin*, 2016 WL 3514126 from the Western

District of New York, June 28, 2016.

The mental, I'm less convinced that the Commissioner erred with regard to the mental limitations and conditions experienced by the plaintiff. Those are discussed at 20 to 21 of the administrative transcript. At the hearing plaintiff stated that he had no problem with his memory, attention and concentration, understanding and ability to perform, understand and follow instructions, that's at page 40. The administrative law judge considered the four relevant functional areas and found mild limitations in three and none in the fourth. I think the findings are supported and well stated.

Finally, in connection with incontinence, the relevant period is May 18, 2016 to January 29, 2019. Many of the records cited by the plaintiff predate that, and there is indication that there was improvement, particularly with regard to the bowel incontinence. However, in Dr. Plocek's medical opinion, which appears at 1688 through 1692 of the administrative transcript, it's clearly indicated that there are continued issues both with regard to urinary incontinence and bowel incontinence and control, and at 1689, it is a condition that is characterized as permanent for life. The plaintiff did testify to effects of his incontinence on odor and job loss, evictions. Unfortunately it was not well developed at the hearing as to what requirements he would

have in terms of access to bathroom facilities, how often and how long, but those are things that should have been considered, put into the residual functional capacity finding if there had been one. I think that the incontinence should have been considered severe at step two. *Crowley v. Apfel*, 197 F.3d 194 from the Fifth Circuit Court of Appeals, 1999. The next issue -- so I find error at step two.

I also find error in the failure to consider the medical source opinions in the record. There are medical opinions from Dr. Margaret Plocek, a treating source, 1688 to 1692. There are medical source opinions from Dr. Laura Martin, another treating source, from October 19, 2018, and that appears at page 1651 to page 1657. There's a medical opinion from Dr. R. Nobel, PhD, from December 21, 2016, an agency consulting psychologist, nonexamining. There's an opinion from Dr. Jeanne A. Shapiro, December 15, 2016, page 905 to 909, and an opinion from Clinical Social Worker Adam Schwartz from May 5, 2017, not an acceptable medical source but someone that has treated the plaintiff for his medical conditions.

Under the treating source rule, the opinion of a treating physician regarding the nature and severity of an impairment is entitled to considerable deference, provided that it is supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with

other substantial evidence. *Veino v. Barnhart*, 312 F.3d 578, Second Circuit 2012. Where there are conflicts in the medical opinions in the record, it is for the administrative law judge to weigh and resolve those conflicts. *Veino*, 312 F.3d at 588.

Clearly, there is error in this case in that the plaintiff -- in that the administrative law judge does not address the medical opinions in the record. Under 20 C.F.R. Section 404.1527 and Section 416.927, it is the duty of the administrative law judge, not the court, to weigh medical opinions. I reject in this case post hoc rationale and an invitation that the court perform that function. It is for the administrative law judge. When the relevant factors concerning the weight to be given to a medical opinion, the so-called *Burgess* factors, are not considered, the court may nevertheless find it is harmless error if, and it's based on a searching review of the record, that the treating source rule has not been violated. *Estrella v. Berryhill*, 925 F.3d 90, Second Circuit 2019. I'm unable to say that, however, in this case, because there was no analysis whatsoever of the opinions, including two from competent treating sources and a third from a treating source although not a medical, acceptable medical source. So I find error at step two, and I find that it is harmful error and a basis to remand the matter to the Commissioner.

I am therefore not going to address the third argument concerning the analysis of plaintiff's subjective complaints.

I will, however, grant judgment on the pleadings to the plaintiff and remand the matter to the agency for further consideration with respect to the step two determination and the medical opinions in the record and, if appropriate, to continue through to step five of the sequential analysis. I don't find any persuasive evidence of disability so I'm not going to direct a finding in that regard.

Thank you both for excellent presentations, please stay safe.

MS. LOMBARDI: Thank you, your Honor.

MS. OELTJEN: Thank you.

(Proceedings Adjourned, 2:46 p.m.)

CERTIFICATE OF OFFICIAL REPORTER

I, JODI L. HIBBARD, RPR, CRR, CSR, Federal Official Realtime Court Reporter, in and for the United States District Court for the Northern District of New York, DO HEREBY CERTIFY that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 3rd day of March, 2021.

/S/ JODI L. HIBBARD

JODI L. HIBBARD, RPR, CRR, CSR
Official U.S. Court Reporter